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In the Supreme Court of the United States

OCTOBER TERM, 1973

Misc. No. 73-389

MORRIS JOHNSON, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PRIESMAN GRAPHICS — OMAHA, NEBRASKA

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on July 24, 1973.

CITATION TO OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals is appended to this Petition.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Eighth Circuit sought to be reviewed was made and entered July 24, 1973. The Court denied a motion for stay of the mandate.

The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1257(3).

QUESTION PRESENTED

1. Is an accused person's right to an impartial, unbiased jury violated by compelling him to proceed to trial before a jury chosen from prospective jurors out of which a solid majority had previously served on one or more juries that have heard and decided six consecutive drug cases at which substantially the same government witnesses who are to testify against petitioner have given testimony?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 6

Rights of the accused. — In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF FACTS

Prior to trial Petitioner through counsel requested an order discharging the jury panel for the reason that a majority of the panel members had on one or more occasions heard the government's three main witnesses giving testimony against other defendants on charges similar to that against Petitioner (T4:5-13). Petitioner's alternative motion was for a continuance (T4:23-25). These motions were denied (T5:2).

In closing arguments the prosecution made the following remarks:

> Mr. Wherry: ". . . Well it's easy to get in this town because pushers like the defendant will sell to anybody, and they'll sell to three people that walk up to them on the street. That's why it's easy to get . . . ." (T236:15-19)

Petitioner through counsel moved for an order to strike the statement on the basis that such remarks were unsupported by evidence (T236:20-23). The motion was denied (T236:24-25). After the reading of instructions the Petitioner renewed his objection to the remarks but this time in the form of a motion for a declaration of a mistrial (T252:20-22; T253:15-16). The motion was denied (T253:17-22). Petitioner through counsel objected to instruction 18.

> INSTRUCTION NO. 18: "The law does not compel a defendant in a criminal case to take the witness stand and testify, and no presumption of guilt may be raised, and no inference of any kind may be drawn from the *failure* of a defendant to testify. * * * * (Emphasis added.)

Specifically Petitioner objected on the ground that word failure intimates a tortious neglect or a failure of responsibility, duty or required act on the part of the defendant (T254:8-11). The objection to the instruction was overruled (T255:3-4).

REASONS FOR GRANTING WRIT OF CERTIORARI

A defendant in a criminal proceeding does not receive a fair and impartial trial where it appears that some of the members of the jury at his trial previously served on juries at trials of other defendants charged with similar but independent crimes where the same witnesses were used by the prosecution in all trials.

This trial was the seventh consecutive narcotics case wherein the government had used substantially the same witnesses in each case. Since the credibility of these witnesses was established at the first trial, attacking it at Petitioner's trial was an exercise in futility.

The Circuit Court of Appeals answered this contention by pointing out that no juror indicated that he could not be impartial and that Petitioner's counsel never challenged any juror for cause. Apparently the Court labored under the misapprehension that jurors will form an opinion in one case and jettison it for a subsequent case, even one involving the same issues and witnesses. Petitioner, however, feels that a jury once having passed upon the credibility of witnesses in a similar case, upon substantially the same testimony, and having therefore ordered a verdict on their oaths, is unlikely to hear a subsequent case with such an opinion previously formed without it influencing their action.

CONCLUSION

For the reasons hereinabove set forth, Petitioner respectfully requests that this petition be granted.

Respectfully submitted,

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and
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Attorneys for Petitioner

CERTIFICATE

It is hereby certified that a true copy of the Petition for a Writ of Certiorari to the Supreme Court of the United States was sent to Elliott Richardson, Attorney General of the United States of America, this 23rd day of August, 1973, by United States Mail, postage prepaid.

WALTER J. MATEJKA
and
J. WILLIAM GALLUP
1100 Farm Credit Bldg.
Omaha, Nebraska 68102

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Morris Johnson, Jr., Appellant, v.
United States of America, Appellee.

Filed July 24, 1973. No. 73-1197.

Before Mr. Justice Clark,* Heaney and Bright, Circuit Judges.

Per Curiam:

Appellant Morris Johnson was convicted of knowingly and intentionally distributing heroin. On appeal he challenges (1) the denial of his motion to discharge the jury panel or grant a continuance, (2) certain comments by the prosecutor referring to Johnson as a "pusher" and (3) an instruction stating that no inference of guilt could be drawn from Johnson's "failure" to testify. We find no merit in any of Johnson's claims and affirm the conviction.

(1) The District Court conducted the basic voir dire questioning of the jury panel, but it gave counsel the opportunity to conduct further inquiry. During voir dire several prospective jurors said that they had heard certain government witnesses, Bratton, Ryan and Frazier, testify in previous trials. These same witnesses were expected to and subsequently did in fact testify against Johnson. At the conclusion of voir dire Johnson's counsel expressly declined to challenge any juror for cause. Johnson's first objection to the jury panel was made immediately prior to the

* Associate Justice Tom C. Clark, United States Supreme Court, retired, is sitting by designation.

exercise by him and the prosecutor of their respective peremptory challenges. Johnson based his motion, in part, on the *per se* argument that no fair and impartial jury could be selected from the panel since a majority of these jurors had heard Hutton, Ryan and Frazier testify at one or more previous trials. The District Court denied the motion.

Johnson failed to establish that any juror was actually prejudiced in favor of the three government witnesses. He does not point to the voir dire of any particular juror as indicating actual prejudice, nor does he complain that the voir dire was in any way inadequate. Indeed, he did not even attempt to have any juror dismissed for cause. His claim that he was denied an impartial jury must therefore rest wholly on a *per se* theory of implied bias. We do not think that the danger of prejudice against the accused arising from jurors having served in prior cases involving the same government witnesses but different, unrelated defendants and entirely different and independent transactions is great enough to justify a *per se* rule of bias. The "mere existence of any preconceived notion" relevant to the accused's guilt or innocence is not sufficient to negate impartiality, *Irvin v. Dowd,* 366 U.S. 717, 723 (1961). See *Fabian v. United States,* 358 F. 2d 187, 191 (1966). Johnson does not cite any federal case reversing a conviction on the *per se* rule that he advances and we have discovered none. On the contrary, the cases uniformly reject the argument, *United States v. Haynes,* 398 F. 2d 980 (2 Cir. 1968); *Cwach v. United States,* 212 F. 2d 520 (8th Cir. 1954); *Haussener v. United States,* 4 F. 2d 884 (8 Cir. 1925). See *Casias v. United States,* 315 F. 2d 614 (10 Cir. 1963). While we do not endorse the procedure followed here, we do not regard it as reversible error in the absence of some showing of actual prejudice.

(2) During rebuttal argument the prosecutor made the following statement to the jury:

> "Early in the case the defense counsel suggested how easy it was to get narcotics in this town; like talcum powder in a medicine cabinet, is the example he used. Well, it's easy to get it in this town because pushers like the defendant will sell to anybody, and they will sell to three people that walk up to them on the street. That is why it is easy to get."

Johnson moved for a mistrial on the basis that this statement was not supported by the evidence. We think the court properly denied the motion. A "pusher" is someone who sells illicit drugs. There was ample evidence that Johnson had in fact sold heroin illegally, and the comment was to some extent invited by the earlier comments of Johnson's counsel to which the prosecutor referred. The statement was neither so inflammatory nor so misleading as to require a mistrial. See *United States v. Lewis,* 423 F. 2d 457 (8 Cir. 170), *cert. denied* 400 U.S. 905.

(1) Finally, Johnson complains of Instruction No. 18:

> "The law does not compel a defendant in a criminal case to take the witness stand and testify, and no presumption of guilt may be raised, and no inference of any kind may be drawn from the *failure* of a defendant to testify." (Emphasis supplied.)

His complaint is that the word "failure" carries negative connotations and implies a dereliction of duty on his part. Johnson had previously requested the court to instruct: "The jury is cautioned not to hold anything against the defendant's willful exercise of his right not to testify." The judge advised that he would give this instruction in substance. He also informed Johnson's counsel that he would pause after reading the instructions to the jury to allow counsel an opportunity to make

any objections he wished to the instructions as given. Counsel, however, made no objection until after the jury had been excused and had commenced its delibarations. We have difficulty in perceiving any significant difference between the instruction requested and the one actually given, and we very seriously doubt that the court's choice had any effect on the jury's attitude toward Johnson's refusal to testify. In any event, Johnson waived his objection by not asserting it at the proper time.

The judgment is affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

SUPREME COURT, U. S.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice
Washington, D.C. 20530.

In the Supreme Court of the United States

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Nebraska, petitioner was convicted of having distributed heroin in violation of 21 U.S.C. 841(a)(1). He was sentenced to imprisonment for ten years. The court of appeals affirmed on July 24, 1973 (Pet. App.). The petition was not filed until August 27, 1973, and is thus untimely under Rule 22(2) of the Rules of this Court.

Petitioner contends that he was denied his right to trial by an impartial jury by the inclusion of jurors on his panel who sat in previous cases where the same government witnesses testified against other persons charged with similar but independent crimes. As the court of appeals pointed out, however, in an opinion upon which we rely, petitioner made no effort at trial to have pro-

spective jurors stricken from the jury panel for cause, did not establish that any of the jurors who sat in previous narcotics cases involving the same government witnesses were actually prejudiced against him, and did not complain that the voir dire was in any way inadequate. Indeed, defense counsel affirmatively passed the jury for cause (Supp. Tr. 21). A juror is not disqualified merely because he has previously served in a similar case where the same witness testified on behalf of the government. See *United States* v. *Tropeano*, 476 F. 2d 586 (C.A. 1), certiorari denied, October 9, 1973 (No. 72-6693); *United States* v. *Ragland*, 375 F. 2d 471, 475-476 (C.A. 2), certiorari denied, 390 U.S. 925. The credibility of the government witnesses in each case was tested under different circumstances and against different facts. Petitioner's *per se* attack on the composition of the jury panel was properly rejected by the courts below.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.